Coming Home to Contract: Loosening the Death-Grip of Statutorily Created Rights On Arbitration in the Non-Union World

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I. INTRODUCTION

During the first century of our country's history, employer-employee relations were governed by the "employment at will" doctrine, which allows the employment relation to be severed by the employer for good cause, bad cause, or no cause. This doctrine limits employees' rights by giving tremendous discretion and latitude to employers with regard to the conduct of their particular business enterprises and the qualitative and quantitative nature of their work force.[1] Following World War I, the employees' rights movement gathered support and culminated in the unionization of much of this nation's capital industry. Consequently, in the union[2] context, most wrongful discharge disputes are settled through alternative means, including arbitration, identified and agreed upon in collective bargaining agreements. However, non-union employees[3] obviously do not possess union protection, leaving them and their employers no options but to drop their claims or to seek remedy for wrongful discharge disputes in the courts.[4]

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1. For a general discussion of the development of Labor Law and the erosion of the "at will" doctrine, see Annotation, Right to Discharge Allegedly "At-Will" Employee As Affected By Employer's Promulgation of Employment Policies As To Discharge, 33 A.L.R.4th 120 (1984).

2. For purposes of this analysis, a "union" employee is one whose employment is protected by a collective bargaining agreement, a civil service statute, or an equivalent state statute that requires just cause for discharge.

3. Conversely, for purposes of this analysis, a "non-union employee" is one who is not protected by a collective bargaining agreement, a civil service statute, or an equivalent state statute that requires just cause for discharge.

4. *See* A. WESTIN & A. FELIU, RESOLVING EMPLOYMENT DISPUTES WITHOUT LITIGATION 2 (1988).

Employers and employees[5] by the thousands have decided to exercise the second option. More than 20,000 unjust discharge cases are pending in state courts.[6] Employees are unwilling to dismiss instances of perceived injustice. At the same time, employers are unwilling to become hostage to an employee's threat of a lawsuit. This stalemate results in frustration and a significant waste of money and time brought on by the tremendous cost, unpredictability, and discomfort of trial.

A closer look at the issues of cost, predictability of outcome, and uneasiness with the adversarial process indicates that the experience of a trial leaves much to be desired. In terms of costs, these are largely driven by the expense of legal representation. A recent study by the RAND Corporation's Institute for Civil Justice found that merely the employer's costs of unjust discharge cases were increased by attorney's fees ranging on average from $81,000 to $208,000 per case.[7] The cost of trial seems, on its face, to indicate that both parties may consider another, less costly means of dispute resolution if it could guarantee adequate resolution of disputes at a lower cost.

The decision to suffer the experience of a trial has been further aggravated by the unpredictability of jury trials,[8] although there is a bias favoring employees.[9] Despite this bias, it is not clear that either employees, or employers, favor an adversarial means of settling their disputes despite a potential windfall in the event of a punitive damage award. Logically, an alternative means of conflict resolution that makes the process more equitable, if it were available, would be preferred.

Lastly, trials tend to aggravate an already uncomfortable situation. Implicit in a decision to dismiss an employee is the desire to sever the employee's relationship with the employer. Ironically, when a disgruntled employee brings suit, the relationship between employer and employee is often extended over a period of many months, or even years, as the dispute goes through the court system. Arguably, it is best to shorten the

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5. As the focus of this Article is the effect of the Federal Arbitration Act with respect to non-union arbitration agreements, hereinafter, all references to employees should be construed as pertaining to non-union employees, unless otherwise noted.

6. *See* WESTIN & FELIU, *supra* note 4. Though this number has not been broken down between union and non-union cases, it is presumed that the majority of these cases involve the claims of non-union employees, since wrongful discharge cases in the union context are often settled through binding arbitration as a result of collective-bargaining agreements.

7. Daily Lab. Rep. (BNA) No. 182, at A-10 (Sept. 20, 1988).

8. For a discussion of attitudes toward jury trials, *see* Graham, *Validity of Contractual Waiver of Right to Trial by a Jury in Texas Civil Cases*, 52 TEX. BAR J. 1126 (1989) ("With increasing jury damage awards many businesses have sought to limit their liability by including jury waiver provisions in all contracts.").

9. A recent study of California wrongful discharge cases showed employees winning 78% of those cases that go before a jury, with punitive damages being awarded in 40% of the cases and with an average damage award in excess of $425,000. (quoting Victor Schacter). Daily Lab. Rep. (BNA) No. 35, at A-4 (Feb. 24, 1987).

time of conflict and to lessen the degree of adversity between the parties.[10] An alternative that hastens the process of resolution, and at the same time somewhat eases the adversarial angst engendered by participating in a trial, is preferable.[11]

Given the problems of cost, predictability, and discomfort associated with conflict resolution by means of a trial, it is no wonder that, over the last decade and a half, employers, and to a lesser extent, employees, have sought alternative means of settling their wrongful discharge disputes. In an effort to eliminate the negative aspects of trial experience but still resolve the conflict, many firms have considered various forms of alternative dispute resolution (ADR). Some have adopted internal grievance procedures similar to those adopted by unionized shops. Other firms have changed management style to reflect the "open door" availability of managers and supervisors. Thirdly, arbitration has been gaining increasing popularity over the past several years.[12]

When considering arbitration, one needs to ask: "Why is it preferable to trial?" What about arbitration makes it a viable alternative to the cost, predictability, and discomfort problems of judicial conflict resolution? Of primary merit is the difference between the nature of the arbitration experience as compared to the trial experience.

Ideally and psychologically, arbitration requires individuals to look to themselves and to their own resources to resolve their employment contract conflicts.[13] By its nature arbitration assumes that the adversarial court system is not sufficient in its representation of an individual's interests and that the formalism of the court system makes impossible the use of humanistic elements such as rationality, cooperation and

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10. Thomas Carbonneau provides statistical accounts of the impact of adversarial procedure upon divorce litigation in Carbonneau, *A Consideration of Alternatives to Divorce Litigation*, 1986 U. ILL. L. REV. 1119. He finds that the attention paid to procedural matters, the subsequent delays, and the increase in the length of proceedings resulting from the gamesmanship of adversarial posturing usually exacerbate rather than attenuate the spouses' conflicts. *Id.* at 1120-1123. The more adversarial the posturing on one side, the more the other side will feel obliged to counter with its own attack. *Id.* at 1123, n.4.

11. For a discussion that contrasts adversarial and non-adversarial settlement negotiation, *see* Menkel-Meadow, *Legal Negotiation: A Study of Strategies in Search of a Theory*, 1983 AM. B. FOUND. RES. J. 905 (1983) and Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754 (1984).

12. *See generally* WESTIN & FELIU, *supra* note 4.

13. Carbonneau, *Arbitration and the U.S. Supreme Court: A Plea for Statutory Reform*, 5 OHIO ST. J. ON DIS. RES. 231, 236, n.22 (1990) ("Legal adjudicatory institutions are paralyzed by the intricacies and sophistication of their own processes. The analytical rigor of legal reasoning and complex formalism of legal procedure are inadequate substitutes for individual rationality, personal understanding, and mutual cooperation in the quest to gain the civil resolution of conflictual circumstances.").

understanding.[14] By turning to the arbitration process, individuals state that their interests are best served by a process that relies on humanistic elements to greater extent than the adversarial court system.[15]

Given its reliance on humanistic elements, arbitration provides for flexible dispute resolution that "yields informed, fair, and binding determinations."[16] Arbitration counters the discomfort of the trial process by recognizing that as a goal, in addition to a fair resolution of conflict, the establishment and maintenance of "a basis for constructive interaction in the midst of dispute and its aftermath."[17] Given this perspective, arbitration removes a dispute from the parentalism of the courts and allows the parties "to assume responsibility for and exercise basic governance over their adjudicatory destiny."[18]

In addition to the beneficence of its nature, arbitration and employment contracts that require the arbitration of wrongful discharge claims, provide significant benefits not found in the adversarial system. First, arbitration involves a significant lowering of the cost of resolving employment disputes. Trials are expensive, and they force both parties to incur costs with regard to court fees, and other expenses that are not incurred when one agrees to arbitration. These include costs associated not only with the use of the courts, but costs of preparation as well. In arbitration, the range of issues that can be discussed in the preparation for trial is significantly curtailed. The focus of discussion is centered on the employment contract or employment agreement, and the issues decided by an arbitrator focus on whether an employee was dismissed in accordance with that agreement. The narrow confines of the dispute limit the costs associated with its resolution. Since most of a trial's costs are associated with attorney's fees, it is interesting to note that a recent report by Deloitte, Haskins & Sells to the New York Stock Exchange noted that the legal costs of a trial were 79.66 percent of the award, while the same costs were 28.75 percent of arbitration awards.[19] The report also showed that the amount of the original claim was significantly lower in those

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14. *Id.* ("Antihumanistic both in its principle and in its practice, the adversarial ethic works a subterfuge on society. It is deceitful not only as to its concern for individual interests, but also in its regard for legality and the integrity of the substantive law.").

15. *Id.* ("The social contract for adjudication must be founded upon collective consensus about the true potential and disposition of the human personality when it confronts disagreement.").

16. *Id.* at 231, n.1.

17. *Id.*

18. *Id.*

19. Letter from Deloitte, Haskins & Sells to the New York Stock Exchange (undated) (copy on file at the *Indiana Law Review*) (cited in Hermann, *Arbitration of Securities Disputes: Rodriguez and New Arbitration Rules Leave Investors Holding a Mixed Bag*, 65 IND. L.J. 697, 722 (1990) (Although the statistics presented pertain specifically to customer-originated claims in securities disputes, the relation between litigation and arbitration depicted is considered normative for the purposes of this discussion).

cases going to arbitration, but that the amount of a damage award was greater, as was the amount of the award as a percentage of the original claim.[20] This provides an indication that arbitration may provide significant benefits to the prevailing party while costing the losing party less because of the decreased attorney fees.

Second, arbitration agreements provide a peaceful and prompt way of solving disputes. Both sides are given an even playing field, and because of the narrow range of issues, in most instances the dispute can be heard relatively quickly. These factors thereby relieve both parties of the angst associated with a festering, bad relationship, as often happens when using the judicial system. The Deloitte Report indicates that parties are able to lessen the time required to resolve their dispute by an average of 165 days.[21] Furthermore, one scholar has pointed to the relief from court congestion that results from the use of arbitration as a primary reason for the public policy that favors arbitration.[22]

An arbitration agreement also gains merit because it can be used to support claims of fairness and even-handedness in employment-related litigation. A mandatory arbitration agreement in an employment contract provides evidence to a jury that the employer recognizes his significant advantages with regard to the employer-employee relationship, and that he has willingly sacrificed these advantages in an effort of fairness and cordiality by providing the dismissed employee with an opportunity to resolve any dispute through arbitration at the employer's expense.

Finally, arbitration is meant to provide a binding resolution to a dispute. This assumes, of course, the proper formalities are followed and that the company is willing to let a third party resolve the dispute. This benefit is closely related to that of avoiding the costs of litigation, as any binding resolution to a dispute and/or establishment of facts resolves issues that do not have to be litigated in the future.

The above listing of the benefits associated with resolving an employment dispute by arbitration, as well as others pointed out by various scholars,[23] raises the question: Why would any employment

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20. *Id.*

21. *Id.* (Of 420 cases surveyed, the average elapsed time of a litigated case was 599 days, while the average elapsed time of an arbitrated case was 434 days.).

22. *See* Carbonneau, *supra* note 13, at 233 ("The Court favors arbitration because it can lighten judicial caseloads while not expressly denying access to justice.").

23. *See* P. Gillette & J. Flanagan, Paper delivered to the American Bar Association Annual Meeting of the Labor and Employment Law Section 2, 2-3 (Aug. 8, 1989) ("Employers benefit economically from arbitration by reduced legal fees, less likelihood of huge awards driven by the emotions of the jury, less adverse publicity, and less time spent by management employees assisting in the defense of the claim.").

The benefits of arbitration provisions in general have been studied in the academic community. It is assumed here that the majority of benefits found as being derivative of arbitration in the union context will also be present in the non-union context. In a recent article, eighteen reasons have been identified that support the adoption of some alternative

disputes be resolved by resort to formal litigation? After all, people should logically approach the method of dispute resolution that exacts the least cost, both monetarily and psychologically. Indeed, this approach favoring arbitration is seen in the context of union employment agreements.

In addition to the benefits noted above, part of arbitration's popularity in the union context is derived from the view that it is favored by public policy.[24] Also, courts are held to a strict standard of review of the arbitrator's decision -- only being able to overturn arbitration decisions when the arbitrator has exceeded his authority as provided in the collective-bargaining agreement.[25]

Given its popularity, one would guess that arbitration would be equally as popular in the non-union context. Yet, the arbitration of labor disputes has been, until the recent past, the almost exclusive domain of parties to collective-bargaining agreements.[26]

Arbitration's limited usage in the non-union context was historically due to managerial concepts of workplace control. In the past, many non-union employers ignored the benefits of arbitration and considered the "idea of arbitrating whether an employer had 'just cause' for a particular employment decision an infringement on management's prerogative which could only lead to mediocrity and institutionalized gripe sessions."[27] It is only in recent history that the costs, unpredictability, and discomfort of the adversarial judicial system have reached such a level that parties to non-union employment agreements have increasingly begun

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dispute resolution (ADR) mechanism. Guidry & Huffman, *Legal and Practical Aspects of Alternative Dispute Resolution in Non-Union Companies*, 6 THE LAB. LAW. 1, 27 (1990). Furthermore, an equal effort has been made at identifying the pitfalls of arbitration. Fifteen disadvantages of such a system have been identified. *Id.* at 28-29. Many of the "pros" and "cons" focus on "soft" concepts, i.e., the mental and psychological welfare of employees at both the working and supervisory level. While this welfare is of concern, the difficulty of quantifying these factors makes them difficult to evaluate, consequently they are not considered in any significant detail in this analysis. For the purposes of this discussion, the benefits, and to the extent necessary, the pitfalls, of arbitration in the non-union context are limited to the legal and economic impact of mandatory arbitration provisions.

24. *See infra* notes 42-43 and accompanying text.

25. In 1960, the U.S. Supreme Court decided three cases, subsequently known as the "Steelworkers' Trilogy," that established arbitration as a means of dispute resolution favored by public policy, and established that courts may only overturn an arbitration decision when the arbitrator exceeded his authority as provided in the collective-bargaining agreement. United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers of America v. American Mfg. Co., 363 U.S. 564 (1960). *See also* Guidry & Huffman, *supra* note 23, at 5.

26. P. Gillette & J. Flanagan, *supra* note 23, at 2 ("Until the 1980s, arbitration and mediation were words reserved for discussions among unionized employers.").

27. *Id.*

to view arbitration as a means of dispute resolution that could benefit both the employer and the employee.[28]

Assuming that non-union employers and employees would benefit from the use of mandatory[29] arbitration agreements to the same extent as their union counterparts, it seems axiomatic that such arbitration provisions would be widely included in employment contracts between employers and non-union employees and that non-union employment contracts would involve arbitration agreements to the same extent as union contracts. However, this is not the case, as seen by the magnitude of wrongful discharge cases pending in the courts.[30]

This paradox requires either the reexamination and eventual dismissal of assumptions regarding the benefits of arbitration, or the injection of new factors into the decision of whether to use arbitration. The latter option proves most effective.

Recalling that the benefits of arbitration were postulated in an "ideal world,"[31] there exist assumptions inherent in such a world that do not necessarily prevail in our version of reality. The saliency of using arbitration presumes that arbitration provides for flexible dispute resolution that "yields informed, fair, and binding determinations."[32] If public policy, laws, or treatment of arbitral decisions by the courts do not reflect the idea that arbitration yields such decisions, the foundation of the argument for using arbitration is destroyed.

When assessing whether the foundation of the argument to use arbitration to settle wrongful discharge disputes is made of brick or straw, the discussion tends to focus on the issues of exhaustion, preclusion,[33] and

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28. P. Gillette & J. Flanagan, *supra* note 23, at 2 (stating that "arbitration is an alternative which can offer both the employer and the employee many of the benefits of civil litigation without the expense, time delays, and procedural morass often associated with the court system").

29. The use of the word "mandatory" refers to the nature of the agreement between employers and employees whereby both parties voluntarily agree to submit all wrongful discharge claims to arbitration. It is this submission to arbitration that becomes mandatory. Consequently, all references to non-union arbitration agreements assume that the agreements provide for mandatory arbitration unless otherwise noted. It is recognized that *statutes* compelling employers and employees to submit controversies to *state* arbitration are unconstitutional as they create a system requiring employers and employees to engage in a business relationship on terms not of their own making. Charles Wolff Packing Co. v. Court of Industrial Relations, 262 U.S. 522 (1923); Dorchy v. Kansas, 264 U.S. 286 (1924).

30. *See supra* note 6 and accompanying text.

31. *See supra* note 14 and accompanying text.

32. Carbonneau, *supra* note 13, at 231, n.1.

33. *See* Mazurak, *Alternative Dispute Resolution of Employment Claims: Exclusivity, Exhaustion, and Preclusion*, 64 U. DET. L. REV. 623, 624 (1987):

> The employer and employee must know whether the ADR must be exhausted, either in lieu of, or as a prerequisite to, judicial action. The employee who is required to exhaust the ADR prior to judicial action may lose valuable employment rights if exhaustion is not sought. The

enforceability.[34] If employees or employers lack faith that their agreement to arbitrate provides preclusive effect as to subsequent litigation, or that it will be enforced, their incentive to reach agreement on the use of arbitration is fatally damaged. At best, these agreements become nothing more than ad hoc anomalies;[35] at worst, they become instruments of exploitation.[36] The evolution of arbitration doctrine has contributed to a degree of confusion with regard to the use of arbitration agreements. The lack of universal acceptance of arbitration agreements, and the disdain for mandatory arbitration provisions in non-union employment agreements, are directly attributable to this confusion.[37]

However, the application and interpretation of non-union arbitration agreements by the federal courts in the recent past belies their reputation for impotency and uselessness. It is hypothesized that the reluctance toward using arbitration agreements and the confusion surrounding the enforceability, exhaustion, and preclusion of these agreements have been directly related to two key areas: (1) uncertainty about whether the Federal Arbitration Act (FAA),[38] the federal statute designed to govern arbitration, is applicable to the vast majority of non-union employment contracts, and (2) the inapplicability of the FAA to wrongful discharge disputes if the dispute involves a claim pertaining to a statutorily created right.

Fortunately for those favoring the use of arbitration, over the past few years the federal courts have made decisions that erode the historical

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> employee who obtains reinstatement and back pay from the ADR has nothing unless the award is enforced by a court. The employer that establishes elaborate due process procedures in an ADR unenforced by the courts has established a hollow procedure. The employer that prevails in the ADR has only a momentary victory if it must litigate the discharge again in the judicial forum. If ADR's are to be useful, other than as ad hoc anomalies, the concepts of exclusivity, exhaustion, and preclusion must be considered.

The issues of exhaustion and preclusion are dealt with at great length in Part III, *infra* pp. 17-40.

34. The issue of enforceability concerns whether the arbitration agreement was made in accordance with the principles of contract. *See infra* p. 17.

35. *See* Mazurak, *supra* note 33, at 624.

36. If an arbitration agreement is entered into by two parties, one of which knows that the likelihood of enforcements is minimal, the knowledgeable party may be able to seek concessions from the other by offering the useless arbitration agreement as consideration, thus exploiting the good faith of the ignorant party.

37. As examples of more recent articles that identify this confusion, and consequently question the saliency of the use of mandatory arbitration provisions in general, *see* Mazurak, *supra* note 33; Guidry & Huffman, *supra* note 23; Carbonneau, *supra* note 13. *See also* Dreyer, *Arbitration Agreements After Volt and Browning-Ferris*, 38 U. KAN. L. REV. 667 (1990); Note, *A Test of Arbitrability: Does Arbitration Provide Adequate Protection For Aged Employees?*, 35 VILL. L. REV. 389 (1990); Note, *Arbitrability of Disputes Under the Federal Arbitration Act*, 71 IOWA L. REV. 1137 (1986).

38. 9 U.S.C. §§ 1-14 (1988).

reluctance to resort to arbitration for employment dispute settlement. The courts have used the FAA to give precision to the issues of exhaustion, preclusion, and enforceability with regard to non-union arbitration provisions for wrongful discharge claims; culminating most recently in a Supreme Court decision that destroyed all but the most rudimentary fragments of the statutorily created rights and adhesion barriers to applying contract principles when interpreting the FAA and arbitration agreements in the business context.[39] Additionally, the Supreme Court has agreed to hear a case[40] concerning the exhaustion of arbitral proceedings when the claim is based on the Age Discrimination in Employment Act (ADEA),[41] which is closely analogous to claims based on Title VII[42] of the Civil Rights Act of 1964,[43] and would serve as strong precedent for establishing the arbitrability of both types of claims.

This Article demonstrates that non-union, mandatory arbitration agreements have been approved by Congress and the federal courts as legitimate means for resolving wrongful discharge disputes without recourse to the federal judiciary system. Furthermore, it predicts that, when deciding *Gilmer v. Interstate/Johnson Lane Corp.*, the Supreme Court will reinforce this approval of arbitration as it will decide that statutory rights claims provide no exception to the exhaustion of the arbitral process.

The remainder of the Article is divided into two distinct parts. Part II discusses Congress' intent to create a public policy favoring arbitration by giving validity to non-union arbitration agreements through the FAA. It demonstrates that proper interpretation of the FAA should not prevent the use of arbitration agreements. Part III discusses the courts' interpretation of the FAA and the evolution of the interpretation of arbitration agreements, when the wrongful discharge dispute involves a claim pertaining to a statutorily created right. It is comprised of analyses of the development of the law in this area with regard to the issues of exhaustion and preclusion. This Part concludes that the exception, which does not compel arbitration that is accorded to claims concerning such congressionally created rights, has been eroded and that arbitration of such claims is permitted and may be compelled. The overall analysis

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39. *See* Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989).

40. Gilmer v. Interstate/Johnson Lane Corp., 895 F.2d 195 (4th Cir. 1990), *cert. granted*, 111 S. Ct. 41 (1990) (certiorari granted with regard to the question of whether claims brought pursuant to the Age Discrimination in Employment Act are subject to compulsory arbitration). *See infra* notes 136-140 and accompanying text.

41. 29 U.S.C. §§ 621-634 (1988).

42. 42 U.S.C. § 2000(e)(1)-(17) (1988).

43. For a statement assessing the similarity between ADEA claims and Title VII claims, *see* Alford v. Dean Witter Reynolds, Inc., 905 F.2d 104, 106, n:3 (5th Cir. 1990).

finds that federal policy with regard to non-union arbitration agreements has been established such that the courts' treatment of arbitral decisions is no longer in question, inviting the widespread use of these non-union employment agreements.

II. THE FEDERAL ARBITRATION ACT

A. *Scope of the Act*

U.S. public policy favors the peaceful, private resolution of disputes.[44] Consequently, Congress, in 1925, enacted the Federal Arbitration Act to formally recognize the nation's acceptance of arbitration as a legitimate means of dispute resolution.[45] In doing so, it established that the FAA preempts contrary state law and identifies a uniform national policy favoring arbitration.[46]

The FAA was enacted by Congress to overturn judicial precedent refusing enforcement of agreements to arbitrate, and to eradicate the injustice resulting from this judicial refusal.[47] Congress also recognized that a policy supporting arbitration would reduce the expense and delay of litigation.[48] However, the U.S. Supreme Court has emphasized that the reduction of the expense and time of litigation is not the Act's primary purpose; instead, the Court has trumpeted the Congressional intent to

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44. Nelson, *Arbitration Today: Some Threshold Issues*, 52 TEX. BAR J. 1013 (1989).

45. *Id.* ("The pro-arbitration policy takes statutory form in the Federal Arbitration Act. . . .").

46. Perry v. Thomas, 482 U.S. 483 (1987); Southland Corp. v. Keating, 465 U.S. 1 (1984). *See also* Gillette & Flanagan, *supra* note 23, at 3.

47. H.R. No. 96, 68th Cong., 1st Sess. 1-2 (1924):

> The need for the law arises from an anachronism of our American law. Some centuries ago, because of the jealousy of the English courts for their own jurisdiction, they refused to enforce specific agreements to arbitrate upon the ground that the courts were thereby ousted from their jurisdiction. This jealousy survived for so long a period that the principle became firmly embedded in the English common law and was adopted with it by the American courts. The courts have felt that the precedent was too strongly fixed to be overturned without legislative enactment, although they have frequently criticized the rule and recognized its illogical nature and the injustice which results from it. This bill declares simply that such agreements for arbitration shall be enforced, and provides a procedure in the Federal courts for their enforcement.

48. *Id.* ("It is practically appropriate that the action should be taken at this time when there is so much agitation against the costliness and delays of litigation. These matters can be largely eliminated by agreements for arbitration, if arbitration agreements are made valid and enforceable."). *See* Legg, Mason & Co. v. Mackall & Coe, Inc., 351 F. Supp. 1367, 1372 (D.D.C. 1972) (the basic purpose of the United States Arbitration Act is to relieve the parties from costly litigation and help ease congested court dockets); Robert Lawrence Co. v. Devonshire Fabrics, Inc., 271 F.2d 402 (2d Cir. 1959), *cert. granted*, 362 U.S. 909, *dismissed*, 364 U.S. 801 (1960).

ensure the judicial enforcement of mandatory arbitration agreements.[49] In *Dean Witter Reynolds, Inc. v. Byrd*, a case involving a dentist suing his broker with whom he had a written agreement to arbitrate any disputes that might arise out of the account, for alleged violations of the Securities Exchange Act of 1934, and various state-law provisions, the Court found that:

> The legislative history of the Act establishes that the purpose behind its passage was to ensure judicial enforcement of privately made agreements to arbitrate. We therefore reject the suggestion that the overriding goal of the Arbitration Act was to promote the expeditious resolution of claims. The Act, after all, does not mandate the arbitration of all claims, but merely the enforcement–upon motion of one of the parties–of privately negotiated arbitration agreements.[50]

The Act was also drafted with the intention of being used to govern the applicability of arbitration agreements and to guarantee that in the use of these agreements, the parties preserved their fundamental rights.[51]

In meeting its objective of making arbitration agreements enforceable, the Act declares that "an agreement in writing to submit to arbitration . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist in law or in equity for the revocation of any contract."[52] Furthermore, the Act asserts that in reference to agreements to arbitrate wrongful discharge disputes that all options for achieving successful arbitration be fully exhausted by the parties before they may resort to other means of dispute resolution.[53]

In order to guarantee the exhaustion of the arbitration process, the Act requires the courts to compel arbitration, as required by an arbitration agreement, before other tangential proceedings may be instituted.[54] The compelling of an arbitration hearing preserves the contract between the parties and guarantees that one who has given consideration in exchange for the agreement to arbitrate receives the benefit of his or her bargain.

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49. Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 219 (1985).

50. *Id.* at 219.

51. Nelson, *supra* note 44, at 1013 (The FAA provides "procedural requisites, such as acknowledgement and disclosure, which are intended to guard against the possibility of unintentional waiver of the right to a day in court.").

52. 9 U.S.C. § 2 (1988).

53. 9 U.S.C. § 3 (1988) (stating that "the court . . . shall on application of one of the parties stay the trial of the action until such arbitration has been held in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.").

54. 9 U.S.C. § 4 (1988) ("If the jury finds that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.").

In addition to compelling an arbitration hearing, under the FAA, arbitrators may compel the attendance of witnesses,[55] and their awards may be confirmed by the courts.[56] Additionally, the FAA endorses the use of arbitration and supports arbitral findings by permitting arbitral decisions to be vacated only in limited circumstances.[57]

It is clear that the FAA is designed to enforce arbitration agreements and to make their use more popular by guaranteeing their enforceability and exhaustion. Yet, the FAA's intent and its practical effect have been at odds due to confusion with regard to the Act's applicability and scope.

In order to understand the confusion associated with the Act's scope, one must understand both the applicability of the Act and the limitations of the Act. In terms of its applicability, because the FAA is a federal statute, before it may be applied to a particular case alleging wrongful discharge, two findings must be made: (1) a written agreement to arbitrate wrongful discharge claims exists, and (2) the non-union employment agreement evidences a transaction involving interstate commerce or some other means that provides for federal jurisdiction.[58] For purposes of this discussion, a written agreement to arbitrate is presumed. Thus, it is necessary to address the question of how to determine whether the non-union employment agreement evidences a transaction that provides for federal jurisdiction, if by no other means than it evidences a transaction involving interstate commerce.

The most obvious example of a federal wrongful discharge claim is one arising between federal employees and the government. If this is the limit of scope intended by Congress, the FAA's application to the small segment of the population employed by the federal government provides no real model, nor any significant direction with regard to other disputes. Fortunately, legislative history suggests that Congress intended something more than merely making federal employment arbitration agreements enforceable. The House Report states: "[t]he purpose of this bill is to make valid and enforceable agreements for arbitration contained in contracts involving interstate commerce or within the jurisdiction or admiralty, or which may be the subject of litigation in the Federal

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55. 9 U.S.C. § 7 (1988).

56. 9 U.S.C. § 9 (1988).

57. 9 U.S.C. § 10 (1988) (an arbitral decision may be vacated where the award was procured by corruption, fraud, or undue means; where partiality or corruption in the arbitrators is evident; where the arbitrators are guilty of misconduct; and, where the arbitrators have exceeded their powers).

58. *See* American Home Assur. v. Vecco Concrete Constr. Co., 629 F.2d 961, 963 (1980), citing Bernhardt v. Polygraphic Co., 350 U.S. 198 (1956) (stating that "before the Federal Arbitration Act becomes applicable to the instant case, two findings must be made: (1) there was an agreement in writing providing for arbitration and (2) the contract evidences a transaction involving interstate commerce.").

courts."[59] It is further contended that Congress intended the FAA to have a broader reach, largely out of fear that without a broader jurisdictional base, the FAA would be undermined by federal judges, state courts, or state legislatures.[60] Consequently, the FAA applies to arbitration agreements involving employers and employees engaged in businesses that are protected by Congress under its commerce powers[61] because they fall within the congressional definition of "interstate commerce."

To clearly discern the range of cases now considered subject to the FAA, one must have an appreciation for the meaning of "interstate commerce." Congress has defined "interstate commerce" rather expansively -- most clearly in its discussions on the Fair Labor Standards Act of 1938 (FLSA) and its subsequent amendments.[62]

On the theory that sub-minimum wages and substandard labor conditions burden interstate commerce and obstruct the free flow of goods,[63] Congress developed the "enterprise test of coverage" among other tests to determine whether an employee, employer, or business is engaged in interstate commerce.[64] Under this test, it makes no difference who ships or produces goods, or whether their interstate movement ended before they were handled, sold, or worked on by employees.[65] All that is necessary is that the goods or materials handled, sold, or worked on, moved across state lines during the course of business.[66]

It is further provided that employees engaged in interstate commerce are all "employees of any 'enterprise' engaged in commerce or production for commerce."[67] The practical effect of defining "interstate commerce" in the FLSA is that Congress has essentially brought within the reach of its authority each and every employee in the nation engaging in interstate activities.[68] Given this expansive approach to defining "interstate commerce," and accepting its applicability to other federal law,

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59. H.R. REP. NO. 96, 68th Cong., 1st Sess. 1 (1924) (*cited in* Southland Corp. v. Keating, 465 U.S. 1, 13 (1984)).

60. Southland Corp. v. Keating, 465 U.S. 1, 12-16; Perry v. Thomas, 482 U.S. 483 (1987).

61. U.S. CONST. art. II, § 8 ("[The Congress shall have the Power] to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.").

62. 29 U.S.C. § 201 (1990).

63. 35 TEX. JUR. 2D *Labor* § 9 (1966).

64. *Id.*

65. *Id.*

66. *Id.*; *See* Munn v. Moeller, 251 S.W.2d 801 (Tex. Civ. App. 1952).

67. CONG. RESEARCH SERV., THE CONSTITUTION OF THE UNITED STATES OF AMERICA, ANALYSIS AND INTERPRETATION, S. DOC. NO. 82, 92d Cong., 2d Sess. 177, n.2 (1973).

68. 35 TEX. JUR. 2D *Labor* § 9 (1966).

virtually all non-union employment relationships[69] affected by agreements to arbitrate wrongful discharge claims can be characterized as being involved in interstate commerce, and thus they are subject to regulation by the FAA.

B. *Limitations of the FAA*

Given this discussion of the Act's applicability, its limitations must be addressed. Because the FAA represents the codification of a national policy favoring arbitration, its applicability and scope should only be limited by the Act itself, and any future congressional statutory limitation. The only limitation to the Act's scope is found within the text of section 1, which states that "nothing herein shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."[70] It is within this limitation of the Act's scope that the confusion has arisen.

As in any case in which governmental reach is so broad, it is necessary to exempt certain groups from its control in order to avoid injustices, inequities, and hardships.[71] Consequently, exemptions from the jurisdiction of the FAA are provided to employers, employees, and businesses to whom the application of the FAA is either impractical or impossible.[72] As noted earlier, the FAA provides for exemptions in section 1 where it states: "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in a foreign or interstate commerce."[73]

Unfortunately, the wording of this exclusion creates a paradox and belies the ability to interpret the FAA from a textualist perspective.[74]

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69. An "employer-employee relationship" involved in interstate commerce, and thus subject to the FAA, includes personal service contracts with businesses engaged in interstate commerce. Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 401, n.7 (1967); Erving v. Virginia Squires Basketball Club, 468 F.2d 1064, 1069 (2d Cir. 1972). The one recognized exception to holding contracts for personal services as the subjects of interstate commerce is when the interstate activity is baseball. Federal Base Ball Club v. National League, 259 U.S. 200 (1922). The reasoning applied to exempt baseball from the category of interstate commerce cannot be applied to other employment relationships as it has been limited to the subject of baseball. United States v. Schubert, 348 U.S. 222 (1955); United States v. International Boxing Club of New York, 348 U.S. 236 (1955).

70. 9 U.S.C. § 1 (1988). *But see* Southland Corp. v. Keating, 465 U.S. 1, 12 (The Court identifies two limitations on the enforceability of arbitration provisions governed by the FAA: "they must be part of a written maritime contract or a contract 'evidencing a transaction involving commerce' and such clauses may be revoked upon 'grounds as exist at law or in equity for the revocation of any contract.'").

71. 48A AM. JUR. 2D *Labor and Labor Relations* § 2317 (1979).

72. *Id.*

73. 9 U.S.C. § 1 (1988).

74. For a discussion of the pros and cons associated with a textualist style of statutory interpretation, *see* Zeppos, *Legislative History and the Interpretation of Statutes: Toward a Fact Finding Model of Statutory Interpretation*, 76 VA. L. REV. 1295 (1990).

Employers or employees, seeking to compel the settling of wrongful discharge disputes through arbitration, often find the FAA applicable to their particular employment situation by virtue of congressional expansion of the definition of "interstate commerce," as derived from the "enterprise test of coverage." However, section 1 of the FAA applies an express exclusion from the FAA for the "class of workers engaged in foreign or interstate commerce."[75] This exclusion can be literally interpreted so as to disqualify firms from applying the FAA with the exact words by which they are able to make the FAA applicable. Literally read, interpretation of the FAA is marked by absurdity, with the FAA applying to all employees engaged in interstate commerce, except those engaged in interstate commerce. Logic and respect for congressional intent demand that a literal interpretation be considered unacceptable.

Thus, in an effort to avoid absurdity, non-textual interpretation is required. This paradox is resolved by construing "interstate commerce" differently depending on the purpose of the construction. Because the FAA is intended to have broad effect, the definition of "interstate commerce" with regard to the applicability of the Act is rather broad. Accordingly, exemption provisions are to be construed narrowly.[76] Thus, given the tendency to construe exemptions narrowly, courts generally limit the definition of "interstate commerce" as used in the exemption provision as applying to employees involved in, or closely related to, the actual movement of goods in interstate commerce.[77] This has been further construed as applying only to workers employed in the transportation industries.[78] In summary, with regard to the Act's applicability to a specific employment arbitration agreement, the expansive definition of interstate commerce brings virtually all employee-employer relationships within the jurisdiction of the Act; with regard to the Act's limitation, a

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75. 9 U.S.C. § 1 (1988).

76. Precedent exists for requiring the narrow construction of exemptions. A.H. Phillips, Inc. v. Walling, 324 U.S. 490 (1945) (interpreting the Fair Labor Standards Act); Donovan v. Williams Chem. Co., 682 F.2d 185 (8th Cir. 1982) (interpreting the Fair Labor Standards Act).

77. Dickstein v. duPont, 443 F.2d 783, 785 (1st Cir. 1971), *cited in* Tenney Eng'g, Inc. v. United Electrical Radio & Mach. Workers, 207 F.2d 450, 452-53 (3d Cir. 1953) and Signal-Stat Corp. v. Local 475, United Electrical, Radio, and Mach. Workers of America, 235 F.2d 298 (2d Cir. 1956), *cert. denied*, 354 U.S. 911 (1957), *reh'g denied*, 355 U.S. 852 (1957). *See also* Erving v. Virginia Squires Basketball Club, 468 F.2d 1064, 1069 (a contract for personal service with a business engaged in interstate commerce is within the scope of the FAA); Great N. Nekoosa Corp. v. ASEA, AB, 657 F. Supp. 1253 (W.D. Ark. 1987) (repair on turbine generator not good enough for exclusion because it did not constitute interstate commerce).

78. Tonetti v. Shirley, 173 Cal. App. 3d 1144, 1146, 219 Cal. Rptr. 616, 618 (1985) (citing Miller Brewing v. Brewery Workers Local Union No. 9, AFL-CIO, 739 F.2d 1159, 1162 (7th Cir. 1984)) ("Many federal courts of appeal have held this exclusionary clause applicable only to workers directly engaged in the channels of interstate commerce, i.e., workers employed in the transportation industries.").

narrow construction of the exemption clause removes employees associated with the actual movement of goods in interstate commerce from the Act's jurisdiction.

In fact, interpretation of the scope of the FAA has resulted in the creation of federal substantive law of arbitrability and the presumption of arbitrability of issues where arbitration may appear likely but is questionable. The U.S. Supreme Court held in *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*,[79] a case involving an appeal of a district court's action staying a federal case pending resolution of a state court suit because the two suits involved the arbitrability of the respondent's claims, that:

> The effect of the section [Section 2 of the FAA] is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act.... The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.[80]

Thus, the FAA is the codification of the pro-arbitration policy of the United States. It is intended to govern mandatory arbitration agreements for wrongful discharge claims of virtually all employment relationships through application of the expansive congressional definition of "interstate commerce." The only exceptions to its applicability are found in those businesses or employment relationships that meet the exclusionary criteria within section 1 of the Act. Consequently, the FAA is a precise instrument for governing the arbitration of wrongful discharge claims, and the confusion as to its applicability has been eradicated within the last five years. This former confusion should no longer provide any impediment to the expansive use of arbitration agreements between employers and employees in settling their wrongful discharge disputes.

Because the courts have resolved the issue of the applicability of the FAA as the governing statute of arbitration agreements, the door to wider use of such agreement in non-union employment contracts has been partially opened. It is now necessary to assess the validity of the second major concern deterring the use of arbitration agreements in non-union employment situations -- the courts' treatment of statutorily created rights.

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79. 460 U.S. 1 (1983).
80. *Id.* at 24-25.

III. THE ARBITRATION OF STATUTORILY CREATED RIGHTS

The incompatibility of arbitration agreements and statutorily created rights was established by the Supreme Court in the early 1970s. Prior to this, employment arbitration agreements were regulated by the contract principles that govern the bargaining context.[81] In addition to these principles, arbitration agreements were regulated by the FAA.

The FAA states: "a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction ... shall be valid, irrevocable, and enforceable save upon such grounds as exist at law or in equity for the revocation of any contract."[82] Thus, a literal reading of the FAA shows that an agreement to submit employment disputes to arbitration is enforceable unless there is an error in the actual contracting procedure that permits revocation of the entire contract.[83]

A. *A Case Study*

In 1974, the Supreme Court altered the concept of the enforceability of arbitration agreements by removing claims based on statutory rights from their jurisdiction. That year, the Court decided

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81. Within the principles of contract that have been developed for the regulation of the bargaining context, there are six areas that could apply to void an agreement to arbitrate: the statute of frauds, incapacity to contract, duress, fraud, improper disclosure or concealment, and unconscionability. R. SCOTT & D. LESLIE, CONTRACT LAW AND THEORY 323-469 (1988). For the purposes of this discussion, it is assumed that an arbitration agreement has met the requirements of the statute of frauds and that the parties had the capacity to contract. The remaining areas are subject to elaborate discussion in their own right and will be discussed as appropriate.

82. 9 U.S.C. § 2 (1988).

83. Southland Corp. v. Keating, 465 U.S. 1-14. *But see id.* at 18 (Stevens, J., dissenting); *Id.* at 22 (O'Connor, J., dissenting). This is in accord with the interpretation of arbitration agreements for more than twenty years. In Scherk v. Alberto-Culver Co., the Court stated: "Accordingly, the Act, provides that an arbitration agreement such as is here involved 'shall be valid, irrevocable and enforceable, save upon grounds as exist at law or in equity for the revocation of any contract.'" 417 U.S. 511 (1974). *See also* Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967); Gillette & Flanagan, *supra* note 22, at 4. Indeed, in the past few years, enforcing arbitration agreements in all contract disputes, including those where specific statutory remedies have been provided, has become standard practice. Alford v. Dean Witter Reynolds, Inc., 905 F.2d 104, 106 (5th Cir. 1990) ("Permitting enforcement of statutory remedies by means of contractual arbitration has thus become the norm rather than the exception for contracts governed by the Federal Arbitration Act."). The courts have rejected arguments that enforcing arbitration agreements will result in an unreasonable restraint of competition because employment may be conditioned on the acceptance of a mandatory agreement to arbitrate employment disputes. Dickstein v. duPont, 443 F.2d 783, 785 (1st Cir. 1971) (On the issue of enforceability, the district court, noting the grant of self-regulatory authority to stock exchanges under the Securities Act of 1934, 15 U.S.C. § 78a, *see* Silver v. New York Stock Exchange, 373 U.S. 341 (1963), held (1) that it was not "readily apparent" that conditioning approval of employment on submission to arbitration would result in unreasonable restraint of competition and (2) that, even assuming such restraint, such a requirement pursuant to Exchange rules approved by the S.E.C. "does not derogate from the self-regulatory grant of the Securities Act").

Alexander v. Gardner-Denver Co.[84] In this case, the petitioner, Mr. Alexander, was discharged from his position at Gardner-Denver. His employment and complaint that his discharge was racially motivated were governed by an arbitration agreement that had been reached pursuant to a collective-bargaining agreement. The arbitrator ruled that the petitioner had been properly discharged, but made no reference to the petitioner's claim of racial discrimination. The Supreme Court, in an opinion written by Justice Powell, stated that "federal courts have been assigned plenary powers to secure compliance with Title VII."[85]

Consequently, Justice Powell concluded, "[i]n sum, Title VII's purpose and procedures strongly suggest that an individual does not forfeit his private cause of action if he first pursues his grievance to final arbitration under the nondiscrimination clause of a collective-bargaining agreement."[86]

With this decision, the Court seriously curtailed the use of mandatory arbitration agreements for the resolution of employment disputes by making illegitimate the resolution of claims based on statutorily created rights. Petitioners who lost such claims in arbitration had the right to bring their claim again in court, thus eroding the benefits of arbitration.[87] The Court, in essence, found that these claims could not be interpreted according to contract principles. Subsequently, federal courts found the statutory rights exception applicable to all labor arbitration cases, not just those reflective of a collective-bargaining agreement.[88]

By declaring the supremacy of statutorily created rights, the Court declared them immutable, and thus unable to be contracted around.[89] Immutable rules are justifiable from a normative perspective,[90] in that they

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84. 415 U.S. 36 (1974).

85. *Id.* at 44.

86. *Id.* at 49.

87. The possibility of petitioners bringing their claims a second time removed most of the incentives to arbitrate as the second suit increased costs, increased the length of dispute resolution, and further eroded already strained relations.

88. Seaboard Coast Line R.R. Co. v. National Rail Passenger Corp., 554 F.2d 657 (5th Cir. 1977) (per curiam); Fund Admin. Servs., Inc. v. Jackson, 518 F. Supp. 783, 785 (W.D.La. 1981); Wick v. Atlantic Marine Inc., 605 F.2d 166, 168 (5th Cir. 1979) (the court rejected any distinction between commercial arbitration clauses and arbitration clauses in the context of labor-management relations, where the "positive assurance" test originated).

89. For a thorough discussion of the relationship between immutable and default rules, see Ayres & Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87 (1989).

90. *Id.* at 88 ("There is surprising consensus among academics at an abstract level on two normative bases for immutability. Put most simply, immutable rules are justifiable if society wants to protect (1) parties within the contract, or (2) parties outside the contract. The former justification turns on parentalism; the latter on externalities."(citation omitted)). *See also* I. MACNEIL, CONTRACTS: EXCHANGE TRANSACTIONS AND RELATIONS 346-47 (1978); Calabresi & Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1093 (1972) (discussion of inalienable rules).

can protect both parties within the contract and parties outside the contract. With the goal of protecting parties within the contract, immutable rules meet the requirements of a policy of parentalism in which parties to contracts are not considered capable of fully appreciating the implications of their contract. With the goal of protecting parties outside the contract, it is argued that immutable rules protect societal interests in the development of precedent, which would not occur if all parties were encouraged to contract around the rules and agree to arbitration instead of pursuing conflict resolution in the courts.[91]

However, these normative considerations belie the normative value of freedom of contract. Assuming this value, it is arguable that the Court erred in *Gardner-Denver* by not accurately assessing the adequacy of treating statutorily created rights as default rules,[92] and thus subject to being contracted around. It seems plausible that one party to an arbitration agreement may have given some consideration in exchange for the agreement to arbitrate. To deny the preclusion of an arbitral finding with respect to a statutorily created right denies a party the benefit of the bargain.

The adequacy of treating these rights as default rules versus immutable rules gains more credence when one considers their benefits. Arguably, default rules make for more efficient contracts because they allow the contracting parties to place a value on the restraint of their actions, thus eliminating the possibility of the courts or the legislature improperly valuing their actions. In *Gardner-Denver*, the Court should have considered the effects of treating the statutory right to a judicial decision as a default rule and the consequences of this treatment with regard to future behavior of contracting parties and the use of arbitration.[93]

The argument for treating the statutory right as a default rule is centered on the belief that arbitration is more desirable than litigation. Given this, parties to an arbitration agreement have an incentive to

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91. *See* Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1082-85 (1984) (Professor Fiss, in arguing against settlement, highlights the positive aspects of judicial decision-making.).

92. "Default rules have alternatively been termed background, backstop, enabling, fallback, gap-filling, off-the-rack, opt-in, opt-out, preformulated, preset, presumptive, standby, standard-form and supplementory [sic] rules." Ayres & Gertner, *supra* note 89, at 91.

93. Ayres & Gertner state this more eloquently when they state that often:

> [t]he majoritarian approach fails to account for the possibly disparate costs of contracting and of failing to contract around different defaults. For example, if the majority is more likely to contract around the minority's preferred default rule (than the minority is to contract around the majority's rule), then choosing the minority's default may lead to a larger set of efficient contracts.

Id. at 93 (citation omitted).

contract around default rules that require litigation. In *Gardner-Denver*, when the collective-bargaining agreement was being negotiated, the parties, preferring not to go to trial in many cases, had an incentive to contract around the statutory rule.

Given the incentive to contract around the rule, the next question focuses on completeness and whether the parties were aware of the potential extent of the scope of the arbitration agreement. In short, in *Gardner-Denver* did the parties know that they were agreeing to arbitrate Title VII claims? In answering this question, the benefit of arguing in accordance with contract principles in comparison to the two normative principles discussed above is readily apparent. This question is really one of completeness.

Discussion should not focus on discerning congressional intent as much as it should focus on the actual arbitration agreement. If the statutory right is considered a default rule, the Court still needs to answer the question: "Was the rule contracted around?"

By asking this question and by treating the statutory rule as a default, the burden is placed on the parties to make sure that their clear intent is known via their arbitration agreement. This may go as far as requiring the agreement to specifically mention its applicability to the specific statutory right. Employees may have to sign separate covenants indicating that they understand that they are giving up their statutory rights. Additionally, these separate covenants may have to be priced separately. If intent is not clear, the default governs.[94] If the courts view a statutory right as near-immutable, in order to protect it, they merely require a more specific indication of its being contracted around.[95]

As is recognized, the greater the cost of contracting around a default rule, the more it looks like an immutable rule. What the Supreme Court did in *Gardner-Denver* was confuse a default rule, which is somewhat costly to contract around, with an immutable rule.

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94. Another option available to the legislature and the courts is the creation of a "penalty default" rule, which is "designed to give at least one party to the contract an incentive to contract around the default rule and therefore to choose affirmatively the contract provision they prefer." *Id.* at 91. The motivator behind a penalty default is that it forces contracting around because the default is unacceptable. With regard to arbitration, a penalty default could be either that the employer wins the dispute or that the employee wins the dispute, depending on whom the courts or the legislature are attempting to motivate to take action to contract around the default. With a penalty default geared against the employer, he bears all the risk of the arbitration agreement not being specific, complete, and fair. If the court finds the agreement unsatisfactory in any of these areas, the employer loses the case. Penalty defaults, in essence, place a premium on contract principles. They value *ex ante* the cost of non-compliance.

95. Professors Ayres & Gertner recognize this judicial interpretive prerogative. They state that "[t]here may be situations in which courts should increase the costs of contracting around defaults to force the majority of parties into a particular channel. For example, if a certain type of contract generates a mild externality, we may want to discourage most people from entering this type of contract." *Id.* at 125.

B. *Subsequent Developments*

What has occurred since *Gardner-Denver* is the resurrection of the default rule and the return to contract interpretation with regard to arbitration agreements. This process has taken some time, and it is possible to blame the lack of use of arbitration in non-union wrongful discharge disputes on the confusion that this journey home, to the land of contract, has created. Because the ability to contract around the statutory right was unknown, the costs of contracting around the right were infinite. However, the Court has decided several cases in the past few years that now permit treating statutory rights as default rules and allow some reasonable assessment of the cost of contracting around these rules. The remainder of this section looks at the treatment of arbitration agreements within the framework of the issues of exhaustion and preclusion, the principle issues on which to assess the value of an arbitration agreement. This analysis shows how the courts have applied the FAA in interpreting arbitration disputes, and shows how the courts have moved away from the treatment of statutory rights as immutable rules.

1. *Exhaustion*

With the Supreme Court declaring a right to judicial interpretation of claims based on statutory rights, logic compels the question, "Why go to arbitration at all?" It seems obvious that parties considering an agreement to arbitrate would question the benefit of such an agreement. The country's employers and employees would not be justified in adopting such arbitration agreements without additional assurances that neither party could resort to the judicial forum for the resolution of any claim before all the provisions of an arbitration agreement were exhausted -- that is before all matters were first decided by an arbitrator.

Without such assurances, a party could weigh her chances in the arbitration proceeding and bypass it if she felt that her chances were better in court. Furthermore, without such assurances, parties would have an incentive to concoct and fabricate violations of their statutory rights in order to get out of their obligations as defined by the arbitration agreement. If the exhaustion of the arbitral process, as required by an arbitration agreement, were waived, arbitration of employment disputes would cease to exist in the non-union context. The agreement to arbitrate would be, in effect, a paper lion.

Ironically, Congress, in the adoption of the FAA, was sensitive to this concern and feared that parties would tend to forum shop. Consequently, it withdrew the power of the states to decide the legitimacy

of the arbitration agreement,[96] and gave the courts power to stay court action until the court either decides that the issue in question is not arbitrable, as defined by the agreement, or until the arbitration is complete.[97]

Section 3 of the FAA states that it: "shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration."[98] Thus, the Act provides the rule that arbitration proceedings must be exhausted before attempting to adjudicate the matter in court.[99]

The enforcement of this rule is provided by § 4 of the FAA: "[a] party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition a United States district court . . . for an order directing that such arbitration proceed in the manner provided for in such agreement."[100] Despite what appears to be the establishment of a policy of exhaustion, as depicted in the FAA, the Supreme Court's decision in *Gardner-Denver* sent a strange signal to the public with regard to the efficacy of using arbitration agreements. Justice Powell's opinion clearly states that "an individual does not forfeit his private cause of action *if he first pursues his grievance to final arbitration*,"[101] thereby implying an exhaustion requirement. However, later in the opinion, Justice Powell states that "[t]he purpose and procedures of Title VII indicate that Congress intended federal courts to exercise final responsibility for enforcement of Title VII; *deferral to arbitral decisions would be inconsistent with that goal.*"[102] The statement

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96. Southland Corp. v. Keating, 465 U.S. 1, 10 (1984) (stating that "[i]n enacting Section 2 of the federal act, Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration"). *See* Gillette & Flanagan, *supra* note 23, at 6.

97. Legg, Mason & Co. v. Mackall & Coe, Inc., 351 F. Supp. 1367, 1370 (D.D.C. 1972) (9 U.S.C. § 3 requires a federal court in which suit has been brought "upon any issue referable to arbitration under an agreement in writing for such arbitration" to stay the court action pending arbitration once it is satisfied that the issue is arbitrable under the agreement). Note that the decision of the court is not whether the question is arbitrable with respect to the statutory right, but with respect to the terms of the arbitration agreement. The court did not create a presumptive right to question arbitrability with respect to statutory rights.

98. 9 U.S.C. § 3 (1988).

99. In Bernhardt v. Polygraphic Co., 350 U.S. 198 (1956), the Supreme Court did marginally narrow the applicability of the stay provision by holding that the stay provisions of § 3 apply only to the two kinds of contracts specified in §§ 1 and 2 of the Act, namely those in admiralty or evidencing transactions in "commerce." As we have already concluded that "interstate commerce" has been so expansively defined so as to include virtually all employment relationships, this point has become moot for purposes of our discussion. *See supra* notes 68-78 and accompanying text.

100. 9 U.S.C. § 4 (1988).

101. Alexander v. Gardner-Denver Co., 415 U.S. 36, 49 (1974) (emphasis added).

102. *Id.* at 56 (emphasis added).

that arbitral decisions will be denied a preclusive effect[103] negatively affects the strong incentive to use arbitration because it no longer guarantees that arbitration provides binding resolution of conflict.

This announcement that arbitral decisions had no binding effect on statutory rights claims led naturally to the theory that arbitral decisions should not be binding at all, thereby completely removing any incentive for employers and employees to reach arbitration agreements. *Gardner-Denver* created the impression that arbitration involving statutory rights claims was a non-starter. Thus, when employers and employees agreed to arbitrate wrongful discharge disputes, their agreement was practically altered so that they agreed to arbitrate all disputes not based on statutory rights claims.

Recognizing that this strongly eroded the incentive to use arbitration, and aware that they never intended to refute the fact that courts could find value in arbitral findings,[104] the Court began the process of clarifying this issue, ending with the full adoption of the FAA as the standard, and thus requiring the exhaustion of all means available as a result of an arbitration agreement before any further action could be brought in the courts.

The first major clarification occurred in 1983 when the Supreme Court decided *Moses H. Cone Memorial Hospital.*[105] In this case, what appears to be a motivator for the Court's action is not the desire to clarify the exhaustion issue, but to deny the opportunity for state court decisions to have *res judicata* effect on federal court decisions. The Court recognized that "a stay of the federal suit pending resolution of the state suit meant that there would be no further litigation in the federal forum; the state court's judgment on the issue would be [*res judicata*]."[106]

The Court further recognized "the fact that federal law provides the rule of decision on the merits,"[107] and consequently, that the FAA was considered to create "a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act."[108]

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103. The preclusive effect given to arbitral decisions is discussed in detail later in this Article. *See infra* notes 144-185 and accompanying text.

104. The Court had recognized the evidentiary value of arbitral finding in *Gardner-Denver*. The opinion states that "[t]he arbitral decision may be admitted as evidence and accorded such weight as the court deems appropriate." Alexander v. Gardner-Denver Co., 415 U.S. 36, 60 (1974). However, its refusal to adopt standards as to the weight accorded an arbitral decision, did not eliminate the confusion as to whether arbitration should proceed despite the existence of a statutory rights claim. *Id.* at 60, n. 21.

105. 460 U.S. 1 (1983).

106. *Id.* at 10 (citing Ultracashmere House, Ltd. v. Meyer, 664 F.2d 1176, 1183-84 (11th Cir. 1981) and Merrill, Lynch, Pierce, Fenner & Smith, Inc. v. Haydu, 637 F.2d 391, 397-98 (5th Cir. 1981).

107. Moses H. Cone Memorial Hospital, 460 U.S. 1, 23 (1983).

108. *Id.* at 24.

The Court concluded that "[t]he Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues *should be resolved in favor of arbitration. . . .*"[109] Thus, the Court took a significant step toward resuscitating the use of arbitration agreements by this declaration of the presumption of arbitrability of all claims. However, they had not completely declared that courts should compel arbitration in accordance with the FAA.

In 1985, the Supreme Court took this step and ended most of the confusion with regard to exhaustion that stemmed from *Gardner-Denver*. First, the Supreme Court further limited the statutory rights exception by developing a two-part test that limited exceptions to (1) statutory claims, which (2) are limited by legal elements that foreclose the use of arbitration.[110] Therefore, non-union agreements to arbitrate wrongful discharge claims are enforceable unless they are overridden by subsequent, contrary congressional command.[111]

The treatment of causes of action comprised of both federal law claims and pendent state law claims was also a major source of difficulty for the courts, especially with regard to exhaustion principles. Prior to *Dean Witter Reynolds, Inc. v. Byrd* in 1985, the federal courts of appeals were divided in their approach to the exhaustion of arbitration procedures, given the presence of claims based on both federal and state law.[112]

The Fifth, Ninth, and Eleventh Circuits had adopted the "doctrine of intertwining" to ascertain whether or not to compel arbitration of these causes of action.[113] This doctrine permits the courts to deny arbitration of both the arbitrable claims and the pendent state claims if the court determines that the claims are "sufficiently intertwined factually and legally."[114]

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109. *Id.* at 24-25 (emphasis added).

110. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614, 628 (1985) (the Court devised a two-part test: the first prong is to determine whether the parties' agreement to arbitrate may be interpreted to cover statutory claims; the second and more important prong, is whether legal limitations "external to the parties' agreement foreclosed the arbitration of those claims").

111. Alford v. Dean Witter Reynolds, Inc., 905 F.2d 104, 105 (5th Cir. 1990) ("The Arbitration Act, standing alone, therefore mandates enforcement of agreements to arbitrate statutory claims. Like any statutory directive, the Arbitration Act's mandate may be overridden by a contrary congressional command.").

112. Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 216-17 (1985).

113. *Id.*

114. *Id.* at 217. The Court stated that:

> These courts acknowledge the strong federal policy in favor of enforcing arbitration agreements but offer two reasons why the district courts nevertheless should decline to compel arbitration in this situation. First, they assert that such a result is necessary to preserve what they consider to be the court's exclusive jurisdiction over the federal securities claim; otherwise, they suggest, arbitration of an "intertwined" state claim might precede the federal proceeding and the factfinding done by the arbitrator

The Sixth, Seventh, and Eighth Circuits, on the other hand, had held that "the [Federal] Arbitration Act divests the district courts of any discretion regarding arbitration in cases containing both arbitrable and nonarbitrable claims, and instead requires that the courts compel arbitration of arbitrable claims, when asked to do so."[115] To these courts, the enforcement of arbitration agreements, despite the presence of both federal and pendent state law claims, requires that the court "'not substitute [its] own views of economy and efficiency' for those of Congress."[116] This statement is not merely a caution against the courts substituting their views for those of Congress; it is also suggestive of a reaffirmation of the role of the courts as objective arbiters. Thus, it can be viewed as a caution against the courts substituting their views for those of the contracting parties as well.

In *Byrd*, a unanimous Supreme Court agreed with the Sixth, Seventh, and Eighth Circuits, holding that the FAA requires the district courts to compel arbitration of all claims even where this would result in potential inefficiency by producing proceedings in separate forums.[117] Justice White, in his concurrence, clearly states that the rationale for compelling arbitration is based on preserving freedom of contract:

> The Court's opinion makes clear that a district court should not stay arbitration, or refuse to compel it at all, for fear of its preclusive effect. And I can perceive few, if any, other possible reasons for staying the arbitration pending the outcome of the lawsuit. Belated enforcement of the arbitration clause, though a less substantial interference than a refusal to enforce it all, nonetheless significantly disappoints the expectations of parties and frustrates the clear purpose of their agreement.[118]

In *Byrd*, the Court determined that the Act leaves no room for judicial discretion and mandates that district courts *shall* direct the parties to proceed to arbitration on those issues as required by their arbitration agreement.[119] The Court further found that federal district courts are

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might thereby bind the federal court through collateral estoppel. The second reason they cite is efficiency; by declining to compel arbitration, the court avoids bifurcated proceedings and perhaps redundant efforts to litigate the same factual questions twice.

115. *Id.*

116. *Id.* (quoting Dickinson v. Heinhold Sec., Inc., 661 F.2d 638, 646 (7th Cir. 1981)).

117. Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 217 (1985) ("We agree with these latter courts that the Arbitration Act requires district courts to compel arbitration of pendent arbitrable claims when one of the parties files a motion to compel, even where the result would be the possible inefficient maintenance of separate proceedings in different forums.").

118. *Id.* at 225 (White, J., concurring).

119. *Id.* at 215 (as summarized in the Syllabus by the Reporter of Decisions).

required under the FAA to grant motions to compel arbitration, even of pendent claims, despite the possibility that such action could result in the inefficient maintenance of separate proceedings in different forums.[120]

The Supreme Court has completely opened the door with regard to the exhaustion issue by finding that even statutory rights claims can be compelled to arbitration. Following *Byrd*, in 1987 the Court decided *Shearson/American Express, Inc. v. McMahon.*[121] This case involved a complaint by petitioner against Shearson/American Express, Inc. alleging account churning and violations of section 10(b) of the Exchange Act and the Racketeer Influenced and Corrupt Organizations Act (RICO).[122] The customer account agreement between the parties required the arbitration of all disputes. The respondent moved to compel this arbitration and the district court granted the motion to compel arbitration on all claims except the RICO claim.[123]

Upon appeal by the respondents, the court of appeals upheld the ruling that the RICO claims were non-arbitrable[124] and also found the section 10(b) claims to be non-arbitrable after applying the *Wilko*[125] doctrine.[126] In a 5-4 decision, the Supreme Court reversed both findings, while unanimously agreeing that the RICO claim was subject to arbitration.[127] Furthermore, the Court identified the valid means of determining the existence of a contrary congressional command, which

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120. *Id. See also*, American Home Assur. v. Vecco Concrete Constr. Co., 629 F.2d 961, 964 (4th Cir. 1980) which said:

Mercury is clearly entitled to a stay of the third-party action. And since questions of fact common to all actions pending in the present matter are likely to be settled during the Mercury-Vecco arbitration, we find that all litigation should be stayed pending the arbitration proceedings. While it is true that the arbitrator's findings will not be binding as to those not parties to the arbitration, considerations of judicial economy and avoidance of confusion and possible inconsistent results nonetheless militate in favor of staying the entire action.

121. 482 U.S. 220 (1987) [hereinafter McMahon III], *rev'g* McMahon v. Shearson/American Express, Inc., 788 F.2d 94 (2d Cir. 1986) [hereinafter McMahon II], *aff'g in part, rev'g in part* McMahon v. Shearson/American Express, Inc., 618 F. Supp. 384 (S.D.N.Y. 1985) [hereinafter McMahon I].

122. 18 U.S.C. § 1962(c) (1988).

123. McMahon I, 618 F. Supp. 384, 389 (S.D.N.Y. 1985).

124. McMahon II, 788 F.2d 94, 98-99 (2d Cir. 1986).

125. This doctrine refers to Wilko v. Swann, 346 U.S. 427 (1953). In this decision the Supreme Court held that the Securities Exchange Act created statutory rights that barred enforcement of arbitration agreements regarding claims under § 12(2) of the Securities Act. 15 U.S.C. § 78j(b) (1988). The Court held that this section created a non-waivable right to a judicial forum and that the arbitration process was unlikely to adequately protect federal policies. *Id.* at 434-35. *See also* Note, *Arbitration of Securities Disputes: Rodriguez and New Arbitration Rules Leave Investors Holding a Mixed Bag*, 65 IND. L.J. 697, 699 (1990) [hereinafter *Indiana Note*].

126. McMahon II, 788 F.2d 94, 96 (2d Cir. 1986).

127. McMahon III, 482 U.S. 220 (1987).

emphasized a presumption of arbitrability.[128] Justice O'Connor, writing for the majority, stated that the FAA "mandates enforcement of agreements to arbitrate statutory claims."[129]

In 1989, the Supreme Court finally overruled *Wilko* in *Rodriguez de Quijas v. Shearson/American Express, Inc.*,[130] a case involving a group of investors suing their brokerage firm, alleging that the broker had made unauthorized and fraudulent trades that caused them to lose money.[131] In finding the case arbitrable, the Court declared "[w]e now conclude that *Wilko* was incorrectly decided and is inconsistent with the prevailing uniform construction of other federal statutes governing arbitration agreements in the setting of business transactions."[132] The Court had earlier defined the prevailing uniform construction of arbitration agreements. In the words of Justice Kennedy, writing for the majority, the Court said that "[t]o the extent that *Wilko* rested on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants, it has fallen far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes."[133] The Court redefined its policy favoring arbitration and recognized that its "current" policy is different than expressed in previous years. The Court has declared that statutory rights

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128. *Id.* at 226-27.

> The burden is on the party opposing arbitration, however, to show that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue. If Congress did intend to limit or prohibit waiver of a judicial forum for a particular claim, such an intent "will be deducible from [the statute's] text or legislative history," or from an inherent conflict between arbitration and the statute's underlying purposes. (citation omitted).

Id.

This reliance on express, contrary congressional command to overturn a presumption of arbitrability of a mandatory non-union arbitration agreement for wrongful discharge claims goes so far as to presume that employers and employees are on an equal negotiating plateau, thereby rejecting the invalidity of non-union arbitration agreements based on adhesion contract principles. Gillette & Flanagan, *supra* note 23, at 10 ("Adhesion contract principles like those utilized in Scissor-Tail [Graham v. Scissor-Tail, Inc., 28 Cal. 3d 807, 171 Cal. Rptr. 604, 623 P.2d 165 (1981)], however, are no longer applicable in light of *Perry* and *Keating*. Rather, the courts seem to be compelling arbitration except when federal law invalidates an arbitration provision or state law invalidates the entire contract."). *See, e.g.*, Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614, 627 (1985); Bayma v. Smith, Barney, Harris, Upham & Co., 784 F.2d 1023 (9th Cir. 1986); Tonetti v. Shirley, 173 Cal. App. 3d 1144, 219 Cal. Rptr. 616, 618 (1985) ("The overwhelming weight of authority compels us to conclude California adhesion contract principles are inapplicable to the enforcement of an arbitration clause in a contract governed by the Act.").

129. McMahon III, 482 U.S. 220, 226 (1987).

130. 490 U.S. 477 (1989).

131. *Id.* at 1918-19.

132. *Id.* at 1922.

133. *Id.* at 1920.

should not bar the requirement of the exhaustion of arbitration provisions before pursuing any claim in the courts.[134]

The U.S. Supreme Court recently has added additional credence to the treatment of arbitration in accordance with the principles of freedom of contract. It held that the exhaustive effect of an arbitration agreement is merely operative as a default interpretation of the FAA. Parties to a non-union arbitration agreement may contract around the presumption of an exhaustive effect. In *Volt Information Sciences, Inc. v. Leland Stanford Jr. University*, the Court concluded that where "the parties have agreed to abide by state rules of arbitration, enforcing those rules according to the terms of the agreement is fully consistent with the goals of the FAA, even if the result is that arbitration is stayed. . . ."[135]

This interpretation again shows the demise of the Court's differentiating between contract rights and statutory rights. Statutory rights interpretation implies that these rights are treated as immutable. The Court found the right to exhaustion of arbitration agreements to be a default. This treatment demonstrates the Court's growing preference for interpretation based on contract.

With the decisions in *Rodriguez* and *Volt*, the confusion created by *Gardner-Denver* should be eradicated, and in terms of exhaustion, the principles of contract should govern all agreements to arbitrate, including those pertaining to wrongful discharge disputes. However, despite the saliency of the contract-based argument, lower federal courts have applied the holdings of *Rodriguez* and *Volt* differently. Since the date of the *Rodriguez* holding,[136] there has been a division of the courts with respect to the arbitrability of claims based on both Title VII and the ADEA,[137] some finding the above holdings and contract principles applicable to all statutory rights claims, others limiting the holdings to securities and RICO claims and denying the parties the right to contract around their other statutory rights.

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134. It is important to recognize that in 1985, the Supreme Court acknowledged that the statutory rights found in the antitrust laws do not provide an exception to enforcing arbitration under the FAA. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985).

135. 489 U.S. 468, 479 (1989).

136. May 15, 1989.

137. With regard to Title VII, decisions of the following cases depict this division: Alford v. Dean, Witter, Reynolds, Inc., 905 F.2d 104 (5th Cir. 1990) (contra arbitration); Roe v. Kidder, Peabody & Co., No. 88 Civ. 8507, slip op. (S.D.N.Y. Apr. 19, 1990) (1990 WL52200) (pro arbitration); Utley v. Goldman, Sachs & Co., 883 F.2d 184 (1st Cir. 1989) (contra arbitration).

With regard to the ADEA, the following cases depict this division: Gilmer v. Interstate/Johnson Lane Corp., 895 F.2d 195 (4th Cir. 1990), *cert. granted* 111 S. Ct. 41 (1990) (pro arbitration); Pierce v. Shearson Lehman Hutton, Inc., No. 90-C-0722, slip op., (N.D.Ill. Apr. 25, 1990) (1990 WL60751) (pro arbitration); Nicholson v. CPC Int'l, Inc., 877 F.2d 221 (3d Cir. 1989)(contra arbitration).

Fortunately, this past October, the Supreme Court granted *certiorari* to *Gilmer v. Interstate/Johnson Lane Corp.*,[138] a case that presents the question of whether claims brought pursuant to ADEA are subject to compulsory arbitration.[139] The Court's decision in that case should support the Court's "current strong endorsement of the federal statutes"[140] favoring arbitration. Indeed, the steady progression of the Court away from the treatment of statutory rights claims as defined in *Gardner-Denver* allows one to predict with a fair amount of certainty that the Court will declare the exhaustion of arbitration procedures, as defined in the arbitration agreement, a requirement before subsequent judicial proceedings.

Given a finding supportive of interpreting arbitration agreements solely on the basis of contract principals, the recognized similarity between ADEA claims and Title VII claims[141] should eliminate all questions as to the exhaustion of arbitration proceedings in the non-union context.[142] With respect to exhaustion, the existence of statutory rights' claims should provide no disincentive to the use and promotion of arbitration agreements between employers and non-union employees.[143]

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138. 895 F.2d 195 (4th Cir. 1990).

139. With respect to this case, the petition for certiorari was filed on June 26, 1990 and presented two questions: (1) Are claims brought pursuant to the ADEA subject to compulsory jurisdiction? and (2) Is an arbitration clause executed six years before any claim arises under the ADEA an invalid prospective waiver? On October 1, 1990, the Supreme Court granted certiorari with respect to the first question only.

140. *Rodriguez de Quijas*, 496 U.S. 477, 481 (1989).

141. In *Alford*, Judge Edith Jones of the Fifth Circuit noted the similarity between the arbitrability of employee claims under the ADEA and Title VII, and in that case relied in part upon confusion of lower courts with respect to compelling the arbitration of ADEA claims to justify not requiring the arbitrability of Title VII claims. 905 F.2d 104, 106, n.3 (5th Cir. 1990).

142. It is hoped that the Court, in its decision in *Gilmer* will mention the similarity between ADEA claims and Title VII claims as there have been no petitions for certiorari with the respect to the compulsion of arbitration for Title VII claims in the past several years.

143. As with any general rule, there are exceptions to a universal exhaustion rule. Many of these exceptions pertain to the enforceability of arbitration agreements, and consequently are derived from the principles of contract law.

Though non-union arbitration agreements may be considered a private contractual waiver of the right to jury trial made independently of any pending litigation and most courts have enforced such agreements [Graham, *supra* note 8, at 1126. *See generally* Annotation, *Validity and Effect of Contractual Waiver of Trial by Jury*, 73 A.L.R.2D 1332 (1960)], it is suggested that where agreements to arbitrate are not complete, they will not be considered a valid waiver of the right to a jury trial and thus will not be given exhaustive effect.

In Browning v. Holloway, 620 S.W.2d 611 (Tex. Civ. App. 1981), the parties to a civil action entered into a "stipulation of settlement" that effected a waiver of a jury trial. The court explained that because the plaintiffs repudiated the agreement, even though the trial court entered judgment in accordance with the agreement, the agreement was not complete and thus could not be enforced. *Id.* at 618. Consequently, in Bowater N. Am. Corp. v. Murray Mach., Inc., 773 F.2d 71 (6th Cir. 1985), a case in which the court found an arbitration provision in a settlement agreement enforceable, the Sixth Circuit applied the principles of contract law in interpreting an arbitration agreement. It is arguable that the court treated the arbitration agreement as governed by a default rule. By determining the completeness of the settlement agreement, the court indicated its willingness to deny the

2. *Preclusion*

Examination of federal court holdings shows that non-union mandatory arbitration agreements for wrongful discharge are subject to the principles of exhaustion. Nevertheless, unless the arbitral decisions resulting from such agreements are given preclusive effect, these agreements may see an increase in their usage, but they will never reach their usage potential.

If no such binding effect exists, the benefits from arbitration are weakened, as a dissatisfied employee will merely take "two bites at the apple" -- after losing in arbitration, the employee would merely engage in a lawsuit. In fact, it is arguable that without a preclusive effect, the benefits of arbitration are virtually eliminated as the dispute resolution

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benefits of the apparent bargain if the agreement had lacked specificity.

Furthermore, if it is shown that the consent to arbitration was not voluntary, informed, or that the parties' bargaining power was not equal, an exhaustive effect may not be given to non-union arbitration agreements for wrongful discharge claims as it is deemed unfair to deny the aggrieved party access to a jury. Graham, *supra* note 8, at 1126 ("Federal courts will uphold such contractual waivers only when the party seeking enforcement shows the consent to the waiver was both voluntary and informed and that the parties' bargaining power was equal."). *See, e.g.*, K.M.C. Co. v. Irving Trust Co., 757 F.2d 752 (6th Cir. 1985); National Equip. Rental, Ltd. v. Hendrix, 565 F.2d 255 (2d Cir. 1977); In re Reggie Packing Co., 671 F. Supp. 571 (N.D.Ill. 1987); Leasing Serv. Corp. v. Crane, 804 F.2d 828 (4th Cir. 1986); Dreiling v. Peugeot Motors of Am., Inc., 539 F. Supp. 402 (D. Colo. 1982); National Acceptance Co. v. Myca Prods., Inc., 381 F. Supp. 269 (W.D. Pa. 1974). Decisions reflecting this approach to the validity of arbitration agreements reinforce the fundamental principles of contract and the notion that statutory rights to a trial should be considered default rules.

Furthermore, an exhaustive effect will not be granted to a non-union agreement to arbitrate wrongful discharge claims if requiring the parties to exhaust the arbitration procedure has the practical effect of granting or denying an injunction. Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 288 (1988); Nelson, *supra* note 44, at 1015. This lack of enforcement with regard to exhaustion results from a fear of producing "serious, perhaps irreparable consequences." Graham, *supra* note 8, at 1143 (quoting Baltimore Contractors, Inc. v. Bodinger, 348 U.S. 176, 181 (1955)).

Consequently, the exhaustive effect of requiring arbitration of a claim in accordance with a non-union agreement to arbitrate wrongful discharge claims, where time is of the essence, may be waived. However, this is only done in those few cases in which the defendant would be denied relief if the substantive claims of arbitrability were found to rest on a faulty construction of the non-union employment agreement. Nelson, *supra* note 44, at 1015. *See* Midwest Mechanical Contractors, Inc. v. Commonwealth Constr. Co., 801 F.2d 748 (5th Cir. 1986) (this case serves as an excellent example of the procedural morass that could be generated by aggressive tacticians). Furthermore, Congress has determined that once the courts have decided that the arbitration should proceed, there is no ability to appeal this decision. Judicial Improvements and Access to Justice Act, 9 U.S.C. § 15 (1988). Section 15(b) states:

> Except as otherwise provided in section 1292(b) of title 28, an appeal may not be taken from an interlocutory order -- (1) granting a stay of any action under section 3 of this title; (2) directing arbitration to proceed under section 4 of this title; (3) compelling arbitration under section 206 of this title; or (4) refusing to enjoin an arbitration that is subject to this title.

See also, Nelson, *supra* note 44, at 1015 ("This language brings the federal practice parallel to the state practice eliminating any forum-shopping motive grounded on appealability.").

process would take longer and cost more as both arbitration and litigation are undertaken.

From a normative perspective, it seems axiomatic that the parties, in agreeing to arbitrate employment disputes, would want the arbitral decisions to have a binding effect. However, from a theoretical perspective, it does not seem incredible that parties would bargain for their arbitration agreement to merely have an advisory impact on future litigation. Thus, it is proper to postulate that the existence of a binding effect would be a default rule that the parties could bargain around. Of course, once this is recognized, it becomes necessary to define what the default is. Conceivably, if the default has no binding effect, then parties would be forced to specifically bargain around this default in their arbitration agreement. Fortunately, the FAA addresses this issue and defines the congressionally mandated default with regard to the preclusion of arbitral findings.

There is a statutory implication of a preclusive effect of an arbitral decision in section 10 of the FAA.[144] This section identifies the criteria necessary for the vacating of an arbitrator's decision. These are: (a) where the award was procured by corruption, fraud, or undue means; (b) where arbitrators were evidently partial or corrupt; (c) where arbitrators were guilty of misconduct; and (d) where arbitrators exceeded or imperfectly executed their powers.[145]

If one accepts the theory of *expressio unius est exclusio alterius*,[146] this specific listing of circumstances implies that no other circumstances exist which allow for the vacating of an arbitral award. This gives the status of exclusivity to decisions made by an arbitrator in settling an employment dispute. It further implies that such awards are binding on the parties unless it can be shown that an award should be vacated or that no preclusive effect is recognized.

Additionally, the ability of non-union arbitral decisions of wrongful discharge claims to preclude adjudication of these claims in the courts is

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144. 9 U.S.C. § 10 (1988).

145. *Id.*

146. This phrase is defined as:

> A maxim of statutory interpretation meaning that the expression of one thing is the exclusion of another. Burgin v. Forbes, 293 Ky. 456, 169 S.W.2d 321, 325 (1943); Newblock v. Bowles, 170 Okla. 487, 40 P.2d 1097, 1100 (1935). Mention of one thing implies exclusion of another. When certain persons or things are specified in a law, contract, or will, an intention to exclude all others from its operation may be inferred. Under this maxim, if statute specifies one exception to a general rule or assumes to specify the effects of a certain provision, other exceptions or effects are excluded.

BLACK'S LAW DICTIONARY 521 (6th ed. 1979).

implied in section 9 of the FAA.[147] This section provides a means of formalizing the arbitral decision, thereby giving it the weight of the courts:

> If the parties *in their agreement* have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, that at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award.... If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made.[148]

This section implies that Congress intended, as a default, that arbitral decisions should not have a preclusive effect. By requiring a prior agreement to confirm an arbitral award, the FAA implies that without such a confirmation, the arbitral decision is not to have preclusive effect.

In the early 1970s, prior to *Gardner-Denver*, there was controversy, not as to whether this default was intended, but to what extent the parties had to contract around the default. As an example, the Second Circuit originally held that, absent an agreement to confirm the award, the court has no jurisdiction to enter judgment upon an arbitral award.[149] Specifically, it found that the district court had no jurisdiction to confirm an arbitration award and enter judgment on the award where the contract did not explicitly provide that the judgment could be entered.[150]

However, the following year, the Second Circuit held that consent to entry of judgment can be inferred from the parties' agreement that the arbitrator's decision will be final:

> Whatever 'final' means, it at least expresses the intent of the parties that the issues joined and resolved in the arbitration may not be tried *de novo* in any court, state or federal. Thus, the only point left open for conjecture ... is whether the parties

147. 9 U.S.C. § 9 (1988).

148. 9 U.S.C. § 9 (1988) (emphasis added). Furthermore, recently it has been held by a district court in the same circuit that by filing a lawsuit that obviously involved the validity of an arbitration award, the plaintiff had consented to the entry of judgment on the arbitration by a federal district court. Pennsylvania Eng. Corp. v. Islip Resources Recovery Agency, 710 F. Supp. 456, 461 (E.D.N.Y. 1989).

149. Varley v. Tarrytown Assocs., Inc., 477 F.2d 208 (2d Cir. 1973). *See* Lehigh Structural Steel Co. v. Rust Eng'g Co., 59 F.2d 1038 (D.C. Cir.), *cert. denied*, 287 U.S. 626 (1932); Continental Grain Co. v. Dant & Russell, 118 F.2d 967 (9th Cir. 1941) (where no provision authorizing summary judgment of the arbitrator's award was contained in an arbitration agreement, the district court's order directing that arbitration proceed within the district in accordance with the agreement was a "final order" and appealable).

150. Varley v. Tarrytown Assocs., Inc., 477 F.2d 208 (2d Cir. 1973).

> intended for judgment to be entered in a federal, as opposed to a state, court.[151]

The latter decision provided an easier means of contracting around the default.

Given that Congress intended, as a default, that arbitral decisions should not have a preclusive effect, the limitations of section 10 only apply to those arbitral decisions accompanying an expressed intent to contract around the default. Additionally, the limitations expressed in section 11 of the FAA[152] would also seem to have the same restricted applicability. In accordance with this section, a federal court may modify or correct any award in arbitration;[153] however, this authority is limited to cases in which there was an evident material "miscalculation of figures,"[154] where the arbitrators "awarded upon a matter not submitted to them,"[155] and "[w]here the award is imperfect in matter of form not affecting the merits of the controversy."[156]

Thus, sections 10 and 11 are merely limitations on the ability to contract around the default, making it more difficult by reducing the number of ways to contract around the default of non-preclusion. Given the dependence of the applicability of sections 10 and 11 on whether section 9 itself is applicable, this part of the analysis really focuses on the question of whether arbitration decisions have a binding effect, *assuming such an effect has been agreed upon in the arbitration agreement.* This redefinition of the issue is seemingly unquestionably answered by contract law. In essence, the issue is whether, given express intent to achieve a certain benefit from their bargain, the parties should be allowed to realize that benefit of their bargain.

If one looks to contract law theory and the FAA for the answer, the answer is yes. Given an arbitration agreement that meets the requirements of section 9 of the FAA, it appears that the district courts are required by the FAA to view the arbitral decision almost as that of a lower court. They are limited in their ability to modify or overturn an award unless they find some form of specified error. The FAA implies that the courts must give a tremendous degree of deference to arbitral decisions, only altering them if one of the four limiting factors has been met.

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151. I/S Stavborg v. National Metal Converters, Inc., 500 F.2d 424, 427 (2d Cir. 1974) (emphasis in original).

152. 9 U.S.C. § 11 (1988).

153. *Id. See* Alexander v. Gardner-Denver Co., 415 U.S. 36, 54 (1974) (judicial review is limited).

154. 9 U.S.C. § 11 (1988).

155. *Id.*

156. *Id.*

Court decisions prior to *Gardner-Denver* emphasized the contractual nature of employment arbitration agreements and identified standards by which the effectiveness of contracting around the default could be judged. In addition to the debate in the Second Circuit, in the Fifth Circuit preclusion was generally granted with limited deference in employment discrimination cases being granted by the Court of Appeals if seven factors had been met.[157]

These seven factors are:

(1) the contractual rights are the same as the Title VII rights;
(2) the arbitral decision does not violate the private rights under Title VII or public policy;
(3) the factual issues before the court are identical to the issues before the arbitrator;
(4) the arbitrator is empowered by the collective bargaining agreement to decide the issue of discrimination;
(5) the evidence presented at the arbitration covers all factual issues;
(6) the arbitrator decides all factual issues presented to the court; and
(7) the arbitration procedure is fair and adequate.[158]

Courts also considered fairness of the arbitration proceeding to be of paramount importance, declaring that the arbitral decision system would be considered fair and given preclusive effect if:

(1) the decision-making entity or person and the process itself were both fair and impartial;
(2) the final decision rendered was based on a full and adequate record;
(3) the employee expressly or implicitly consented to the form's authority; and
(4) the legal right claimed was based on the employment contract and not on statute or on a general legal right and principle inviting public policy.[159]

The more fair the procedure, the more likely that its decision will be granted preclusive effect.

The existence of these lists of factors indicates a treatment of section 9 as establishing a default rule. The items listed can be viewed as

157. Rios v. Reynolds Metals Co., 467 F.2d 54 (5th Cir. 1972).

158. Guidry & Huffman, *supra* note 23, at 22 (referencing Rios v. Reynolds Metals Co., 467 F.2d 54, 58 (5th Cir. 1972)).

159. WESTIN & FELIU, *supra* note 4, at 271-72.

standards by which compliance with section 9's requirement to agree to confirmation could be judged. Meeting the requirements is both an indication of desiring to have the arbitral award confirmed,[160] and an indication of adequately contracting around the default, and thus being able to establish a preclusive effect for the arbitral decision.

Despite the strong congressional signal to treat the preclusion of arbitral decisions as a default subject to compliance with section 9, and the creation of standards by which that compliance could be measured, the Supreme Court, in *Gardner-Denver*, bifurcated the application of the default between claims based on non-statutory rights and statutory rights. For non-statutory rights, the Court found that an arbitral decision is final and binding on both the employer and employee; however, with regard to statutory rights the Court found the FAA inapplicable.[161] The Court stated:

> Under the *Steelworkers* trilogy, an arbitral decision is final and binding on the employer and employee, and judicial review is limited as to both. But in instituting an action under Title VII, the employee is not seeking review of the arbitrator's decision. Rather, he is asserting a statutory right independent of the arbitration process.[162]

The Court determined that the parties to the arbitration agreement could not submit their statutory rights claim to arbitration.

Furthermore, the Court ruled out the idea that arbitral decisions would have collateral estoppel effect with regard to factual findings and rulings on non-statutory rights claims.[163] The Court held that federal courts "should consider the employee's [statutory rights claim] *de novo*. The arbitral decision may be admitted as evidence and accorded such weight as the court deems appropriate."[164]

In an effort to justify the Court's holding with regard to preclusion, it is noted that in *Gardner-Denver*, the Supreme Court decided to deny a preclusive effect before it had recognized the full extent and

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160. Meeting the requirements of the lists is an indication that the parties meant the arbitral decision to be final. By assuring fairness in the procedure, they indicated an intent to have the award confirmed by the court. The Second Circuit's opinion in *I/S Stavborg v. National Metal Converters, Inc.* adopts this line of reasoning. *See supra* note 151 and accompanying text.

161. Alexander v. Gardner-Denver Co., 415 U.S. 36, 54 (1974).

162. *Id.*

163. *Id.* at 60.

164. *Id. See also* Wellons, Inc. v. T. E. Ibberson Co., 869 F.2d 1166 (8th Cir. 1989) (the circuit court held that the fact that the arbitration award was not confirmed by a court and was modified by a subsequent agreement did not vitiate its collateral effect in the later action).

power of the FAA to regulate arbitration proceedings.[165] Nevertheless, as a consequence of the decision in *Gardner-Denver*, contract principles of interpretation were limited and federal courts were more likely to give preclusive effect to decisions based solely on the employment contract than to those decisions based on public policy or statutory law.[166]

In *Byrd*, the Supreme Court refused to set out a federal common law rule of preclusion;[167] yet, they did address the issue of preclusion, relegating it as secondary to the decision as to whether exhaustion was enforceable.[168] The Court stated that "[t]he question of what preclusive effect, if any, the arbitration proceedings might have is not yet before us, however, and we do not decide it. The collateral-estoppel effect of an arbitration proceeding is an issue only after arbitration is completed."[169] Furthermore, the Court recognized that federal courts have an obligation to protect federal interests and that a preclusive effect given to an arbitration proceeding may provide such protection.[170]

In *Alford*, Judge Jones identified the federal rule of preclusion by stating that "[t]he Court [in *Gardner-Denver*] rejected a rule of blanket deference owed by federal courts to the prior findings of arbitrators *on Title VII issues*...."[171] Furthermore, in *Alford*, the court described the decision in *Gardner-Denver* as being based on the concern that a labor arbitrator, "whose duty is to enforce the parties' contract rather than extrinsic law, would be unsuited *to apply Title VII principles*."[172]

Consequently, one may infer that a preclusive effect will be given to all non-union arbitral decisions regarding wrongful discharge claims with the exception of those involving Title VII claims, and perhaps with

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165. Alford v. Dean Witter Reynolds, Inc., 905 F.2d 104, 107 (5th Cir. 1990) ("*Alexander* predates the Court's decisions giving full reign to the FAA, and no FAA question is likely to have been considered in *Alexander*.").

166. Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 221 (1985) (parties may agree to limit or waive remedies for rights they create by contract but are on less firm ground in agreeing to waive remedies that public policy may compel).

167. *Id.* at 222 ("[I]t is far from certain that arbitration proceedings will have any preclusive effect on the litigation of non-arbitrable federal claims.").

168. *Id.* at 223.

169. *Id.* However, the Court did state that the full-faith-and-credit statute, 28 U.S.C. § 1738, does not apply to arbitration decisions as the preclusive effect given by the statute applies only to state judicial hearings. *Id.* at 222-23 ("The full-faith-and-credit statute requires that federal courts give the same preclusive effect to a State's *judicial proceedings* as would the courts of the State rendering the judgment, and since arbitration is not a judicial proceeding, we held that the statute does not apply to arbitration awards. McDonald v. West Branch, 466 U.S. 284, 287-88, (1984) (emphasis in original). The same analysis inevitably would apply to any unappealed state arbitration proceedings.").

170. Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 223 (1985) ("Significantly, *McDonald* also establishes that courts may directly and effectively protect federal interests by determining the preclusive effect to be given to an arbitration proceeding.").

171. Alford v. Dean Witter Reynolds, Inc., 905 F.2d 104, 106 (5th Cir. 1990) (emphasis added).

172. *Id.* at 107 (emphasis added).

the exception of those involving claims based on alleged violations of other statutorily created rights.[173] However, despite this logic, the most definitive Supreme Court statement on the issue was made in *Byrd*, where instead of recognizing a preclusive effect for all non-union arbitral decisions, the Court chose to emphasize that federal interests should be protected through an application of collateral estoppel rules.[174]

Interestingly enough, the application of collateral estoppel rules provides a sufficient guarantee of a binding effect to justify the use of arbitration agreements. Theoretically, a specific Supreme Court finding that arbitral decisions have preclusive effect is not required once the Court has agreed that collateral estoppel rules should apply.

Given that the principle of exhaustion is firmly established and there no longer exists an exception to compelling arbitration for statutory rights claims, the principles of contract law guarantee that the courts will give a great deal of deference to arbitral decisions, provided that the arbitration agreement was made in accordance with the standards required by section 9 of the FAA.

To understand this contention, it is important to realize that the Supreme Court, in *Gardner-Denver*, did provide that courts could use their discretion in deciding how much weight to give an arbitral decision. In a footnote, the Court stated that although they would "adopt no standards as to the weight to be accorded an arbitral decision,"[175] relevant factors in determining the court's discretion include "the existence of provisions in the . . . agreement that conform substantially with Title VII, the degree of procedural fairness in the arbitral forum, adequacy of the record with respect to the issue of discrimination, and the special competence of particular arbitrators."[176] The Court went on to state that "[w]here an arbitral determination gives full consideration to an employee's Title VII rights, a court may properly accord it great weight."[177]

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173. *See* Gillette & Flanagan, *supra* note 22 at 20 (quoting Mazurak, *supra* note 31 at 624). ("While claim preclusion is unavailable for statutory claims, courts must and probably will give greater preclusive effect to factual issues determined in arbitration.").

174. Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 222 (1985) which stated:

> We believe that the preclusive effect of arbitration proceedings is significantly less well settled than the lower court opinions might suggest, and that the consequence of this misconception has been the formulation of unnecessarily contorted procedures. We conclude that neither a stay of proceedings, nor joined proceedings, is necessary to protect the federal interest in the federal-court proceeding, and that the formulation of collateral-estoppel rules affords adequate protection to that interest.

175. 415 U.S. 36, 60, n.21 (1974).

176. *Id.*

177. *Id.*

The irony of the Court's listing of relevant factors is that they all correspond to the standards by which courts, prior to *Gardner-Denver*, measured whether parties had satisfactorily contracted around the default in section 9 of the FAA. Furthermore, the factors of procedural fairness and the competence of the arbitrators are assessments that are made when determining whether the parties' contracting around the default rules should be limited by the provisions in sections 10 and 11 of the FAA.[178]

Consequently, findings of later federal cases have treated the recommended procedure of applying collateral estoppel rules as only being applicable to those claims or issues that are based on statutorily created rights, such as those under Title VII.[179] With regard to these claims, collateral estoppel rules provide significant assurances of finality to justify mandatory non-union arbitration agreements for wrongful discharge claims.

Collateral estoppel, or issue preclusion, is appropriate when:

(1) the issue sought to be precluded is identical to the issue previously decided;
(2) the prior action resulted in a final adjudication on the merits;
(3) the party sought to be estopped was either a party or in privity with a party to the prior action; and
(4) the party sought to be estopped was given a full and fair opportunity to be heard on the issue in the prior action.[180]

Because all statutory rights claims are arbitrable, given the development in the principle of exhaustion, even if one party brings a statutory rights claim later in the courts, the factual findings and the arbitral decisions with regard to non-statutory rights should be given collateral estoppel effect,[181] presuming they were confirmed by the court in accordance with section 9.

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178. *See supra* notes 138-40 and accompanying text.

179. Alford v. Dean Witter Reynolds, Inc., 905 F.2d 104, 106 (5th Cir. 1990).

180. *Collateral Estoppel--Arbitration Decisions*, 89 FED. LIT. 234, 235 (1990) (citing Wellons, Inc. v. T. E. Ibberson Co., 869 F.2d 1166 (8th Cir. 1989)). *See* Arkla Exploration Co. v. Texas Oil & Gas Corp., 734 F.2d 347 (8th Cir. 1984), *cert. denied*, 469 U.S. 1158 (1985).

181. The Fifth Circuit, prior to the *Byrd* decision, has held that "district courts should decide arbitrable pendent claims when a nonarbitrable federal claim is before them, because otherwise the findings in the arbitration proceeding might have collateral-estoppel effect in a subsequent federal proceeding." Dean Witter Reynolds v. Byrd, 470 U.S. 213, 216-17, 221 (1985). This implies a collateral estoppel effect for arbitral findings of fact; and given that arbitration is compulsory, it appears that the Fifth Circuit's fears have become reality.

Given the applicability of collateral estoppel,[182] and the Supreme Court's suggested factors for determining evidentiary effect,[183] the Second Circuit has held that where plaintiffs to a cause of action had a full and fair opportunity to litigate an issue in an arbitration proceeding, collateral estoppel was proper and required in order to avoid re-litigation of the arbitral finding.[184] That court required collateral estoppel even though evidentiary standards for arbitration proceedings are not as strict as those under the Federal Rules of Evidence.[185]

The federal courts have consistently held that arbitral decisions should be given preclusive effect. In light of the erosion of the statutory rights exception to the principle of exhaustion, such an exception for the issue of preclusion makes no sense. However, even if preclusion is not granted, the application of contract principles and the principles of collateral estoppel achieve nearly the same practical effect.

The Court recognizes the evidentiary value of arbitral decisions, and as long as parties fashion their arbitration agreements their intention to contract around the default of section 9 of the FAA is clear, sufficient procedural fairness, adequacy of the record, and competency of arbitrators will be guaranteed. Thus, the courts, even accepting the rule in *Gardner-Denver*, should apply the rules of collateral estoppel for non-statutory claims and give the arbitral decisions such great weight as to effectively achieve a preclusive effect, thus rationalizing the merits of arbitration agreements for non-union employment disputes.

IV. CONCLUSION

The increase in the cost and frequency of litigating non-union employment disputes for wrongful dismissal has forced both employers

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182. For purposes of this analysis, of the four factors determining the appropriateness of applying collateral estoppel, points one and three are assumed as given. Also, points two and four, concerning finality and fairness respectively, have been addressed earlier in this analysis. Guidry & Huffman, *supra* note 23 (finality); Pennsylvania Eng'g. Corp. v. Islip Resources Recovery Agency, 710 F. Supp. 456 (E.D.N.Y. 1989), *reh'g denied*, 714 F. Supp. 634 (1989). WESTIN & FELIU, *supra* note 3, at 108 (fairness). Additionally, the Eighth Circuit has noted that collateral estoppel will be granted as arbitration awards may constitute a final judgment. *See* City of Bismarck v. Toltz, King, Duvall, Anderson and Assocs., Inc., 855 F.2d 580 (8th Cir. 1988); French v. Jinright & Ryan, P.C., 735 F.2d 433 (11th Cir. 1984). Finally, it is noted that unless the arbitration procedures were inherently unfair, i.e., they exhibited an egregious deviation from the norm or the decision unreliable, the court should refuse to closely scrutinize the arbitration process for fairness and due process and to overturn an arbitration award. *See* Sanders v. Washington Metro. Area Transit Auth., 819 F.2d 1151, 1157 (D.C. Cir. 1987); Ivery v. United States, 686 F.2d 410, 413 (6th Cir. 1982); Gillette & Flanagan, *supra* note 23, at 12-13.

183. *See supra* note 156 and accompanying text.

184. Benjamin v. Traffic Exec. Ass'n E. R.Rs., 869 F.2d 107 (2d Cir. 1989). *See generally* Note, *Bridging the Procedural Gap: Arbitration Decisions as a Basis for Collateral Estoppel*, 5 OH. ST. J. ON DIS. RES. 189 (1990).

185. Benjamin v. Traffic Exec. Ass'n E. R.Rs., 869 F.2d 107 (2d Cir. 1989).

and employees to seek alternative means of resolving these disputes. Mandatory arbitration agreements provide one means of resolution. Inclusion of these agreements in employment contracts acts as a prophylactic measure that prevents the waste of resources, and does not require the continuation of an employer-employee relationship that has gone sour. Furthermore, arbitration of employment disputes eliminates the problems of cost, predictability, and discomfort associated with conflict resolution by means of a trial.

These arbitration agreements are governed by the Federal Arbitration Act. The Act applies to virtually all non-union employer-employee relationships that meet the very broad definition of "interstate commerce." This Act not only permits arbitration, but compels it. Furthermore, an arbitral decision is final and binding and the Act provides a strong implication of preclusive effect for arbitral decisions.

In applying the FAA to non-union employment agreements to arbitrate wrongful discharge claims, federal courts, with few exceptions derived from the application of contract principles, will find the agreements enforceable. Additionally, the Supreme Court requires all claims pertaining to a non-union arbitration agreement be first handled through the arbitration process, establishing and enforcing the principle of exhaustion. Given their enforceability, the courts are required to compel arbitration in those instances in which one party tries to circumvent the agreement for a non-judicial settlement of the case. As long as the agreement is complete and voluntary, these agreements should be available for widespread use, despite a lack of exhaustive effect. The validity of the agreement is determined through the application of contract principles.

The federal courts have also consistently held that arbitral decisions should be given preclusive effect. Only a few claims, notably those based on alleged violations of statutorily created rights, have been exempted from claim preclusion. With regard to these exemptions, the Supreme Court has fashioned a rule so that arbitral decisions of these claims are given evidentiary weight and may result in issue preclusion. This rule is directly in accordance with the requirements established by the courts for determining whether arbitration agreements have satisfactorily contracted around the default of section 9 of the FAA.

The FAA has been accepted by the courts as the standard for the governing of non-union arbitration proceedings. It has been interpreted so as to guarantee the exhaustion and preclusion of non-union mandatory employment agreements to arbitrate wrongful discharge claims. Because of its guarantee, employers and employees should look to arbitration as a viable, cost-effective alternative to judicial action in settling their disputes.